



8096 N. 85<sup>TH</sup> WAY, SUITE 105  
SCOTTSDALE, ARIZONA 85258  
PHONE: (602) 803-8811  
[WWW.TSLLAWGROUP.COM](http://WWW.TSLLAWGROUP.COM)

November 23, 2020

Docket Supervisor  
Arizona Department of Water Resources  
1110 W. Washington St., Ste. 310  
Phoenix, Arizona 85007

**RE: Motion for Rehearing or Review**

Dear Supervisor,

Enclosed are two *Motion for Rehearing or Review* on behalf of 1) **Baca Float #3 LLC** and 2) **Sopori 12,500 Investors LL and the Sopori Domestic Water Improvement District**. Please file the originals and return one conformed copy each to our office in the self-addressed, stamped envelopes.

Feel free to contact our office with any questions.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Tanya M. Ferreira', written over a horizontal line.

Tanya M. Ferreira  
Legal Assistant

Enclosures

1 Lee A. Storey (011989)  
Alexandra M. Arboleda (016673)  
2 lee@tsllawgroup.com  
alex@tsllawgroup.com  
3 TSL LAW GROUP PLC  
8096 N. 85<sup>th</sup> Way, Suite 105  
4 Scottsdale, Arizona 85258  
Telephone: (602) 803-8811  
5 *Attorneys for Baca Float #3 LLC*

6 **ARIZONA DEPARTMENT OF WATER RESOURCES**

7 **BEFORE THE DIRECTOR**

8  
9 **IN THE MATTER OF THE**  
10 **ADOPTION OF THE MANAGEMENT**  
11 **PLAN FOR THE SANTA CRUZ**  
12 **ACTIVE MANAGEMENT AREA FOR**  
13 **THE FOURTH MANAGEMENT**  
**PERIOD**

**MOTION FOR REHEARING**  
**OR REVIEW**

14 Pursuant to A.R.S. § 45-114(C), Baca Float #3 LLC (“Baca Float”), through its  
15 counsel, hereby files this Motion for Rehearing or Review of the Order of Adoption of the  
16 Management Plan for the Santa Cruz Active Management Area for the Fourth Management  
17 Period (“Motion for Rehearing or Review”). Baca Float respectfully requests that the  
18 Director of the Arizona Department of Water Resources (“ADWR”) review and revise the  
19 October 20th, 2020 Order of Adoption of the Management Plan for the Santa Cruz Active  
20 Management Area for the Fourth Management Period (“Order of Adoption”) for the  
21 following reasons: (1) ADWR does not expressly recognize that the Management Plan for  
22 the Santa Cruz Active Management Area for the Fourth Management Period, dated October  
23 20, 2020, (“SCAMA Fourth Management Plan”) will not affect or limit senior surface  
24 water rights, as required by the Arizona Legislature in A.R.S. § 45-411.04 when it created  
25 the Santa Cruz Active Management Area (“SCAMA”); (2) ADWR cannot impose Well  
26 Spacing Criteria in SCAMA that affect or limit senior surface water rights pursuant to  
27 A.R.S. § 45-411.04; (3) Riparian transpiration demands cannot be given preference over  
28 senior surface water rights under the coordinated management approach required by A.R.S.

1 § 45-411.04; and (4) SCAMA is currently maintaining safe-yield so no additional  
2 conservation requirements are necessary for the fourth management period.

3 **I. ADWR Does Not Expressly Recognize that the SCAMA Fourth Management**  
4 **Plan Will Not Affect or Limit Senior Surface Water Rights as required by**  
5 **A.R.S. § 45-411.04 .**

6 In 1994, when it created the SCAMA from the Tucson Active Management Area,  
7 the Arizona Legislature recognized the unique nature of the Upper Santa Cruz River as  
8 an international stream and its unique hydrology. A.R.S. § 45-411.04(A). As such, the  
9 legislature called for coordinated management of groundwater and surface water in the  
10 region. A.R.S. § 45-411.04(B). However, the legislature specifically recognized that,  
11 “While the coordinated management can include all naturally occurring waters within  
12 the basin, it is not the intent of any party in the [SCAMA] or this legislature **to modify**  
13 **or amend** in any way the fundamental laws and rights to surface water and groundwater  
14 pursuant to the laws of this state.” A.R.S. § 45-411.04(D) (emphasis added). Moreover,  
15 the legislature made it clear that,

16 It is the express intent of the legislature that the creation of the Santa Cruz  
17 active management area is **not to affect** the definition of, or rights to, the  
18 surface waters and the groundwaters within this state, **or to establish any**  
19 **precedent** that could be used in a court of law to **define, limit, or extend** the  
20 rights of this state or the United States of America over the surface waters  
and groundwaters found within this state **or to define or limit the legal**  
**distinction between surface water and groundwater** in this state. A.R.S.  
§ 45-411.04(C) (emphasis added).

21 In the SCAMA Fourth Management Plan, however, ADWR does not reference the  
22 legislative intent expressed in A.R.S. § 45-411.04 and does not specifically state that the  
23 Plan will **not** affect surface water rights, including surface water pumped from wells, or  
24 “subflow.” Subflow is legally characterized as surface water under Arizona law, so the  
25 shallow wells in the Santa Cruz River and its tributaries, from which Baca Float withdraws  
26 water, pump appropriable surface water under A.R.S. §§ 45-101(9), 45-141(A). *See In re*  
27 *Gila River System*, 9 P.3d 1069, 198 Ariz. 330 (Ariz. 2000) (“*Gila IV*”).  
28

1           The fundamental elements of a surface water right are: (1) the priority of senior  
2 surface water users to take water before all junior users during times of insufficient supply  
3 for all users, (2) the right to sever and transfer, and (3) the right to change the point of  
4 diversion and type of use. To maintain such rights, beneficial and continuous use are  
5 generally required. Baca Float holds some of the most senior surface water claims in the  
6 SCAMA, as well as substantial groundwater rights under the 1980 Groundwater Code.  
7 Baca Float is concerned that ADWR's approach to the management of surface and  
8 groundwater rights under the SCAMA Fourth Management Plan will affect the continuing  
9 use of its senior surface water rights.

10           While they are yet to be adjudicated, Baca Float's senior surface water rights have  
11 been, and continue to be, supported by historical fact. Indeed, Baca Float holds surface  
12 water rights that are appurtenant to land "within the boundaries of a land grant from the  
13 United States Government to the heirs of Luis Maria Cabeza de Baca in 1860." *See* Finding  
14 of Fact #2, Director's Findings of Fact, Conclusions of Law, Decision and Order re:  
15 Certificate No. 36-42316, Rio Rico Properties Inc., ST-96-001 (TS-16) (May 16, 1996)  
16 ("S&T Order") at 1. Baca Float's prior vested surface water rights along the Santa Cruz  
17 River have priority dates tied to a perfected Spanish/Mexican land grant arising from the  
18 Treaty of Córdoba, Aug. 24, 1821 (also colloquially referred to as the United States' Treaty  
19 of 1821 with Spain), and the Treaty of Guadalupe Hidalgo, July 4, 1848, 9 Stat. 922. In  
20 1914, the United States Supreme Court upheld and confirmed the validity of this privately  
21 held land grant more commonly known as Baca Float Number Three. *See Lane v. Watts*,  
22 234 U.S. 525, 540 (1914).

23           In the late 1980s, Irrigation Grandfathered Rights ("IGFR") were also issued to Rio  
24 Rico Properties, Baca Float's predecessor in interest. However, when those IGFRs were  
25 issued, the Department recognized that "the withdrawals on which [the] application was  
26 based were probably subflow of the Santa Cruz River." *See* Letter from Director Wesley  
27 E. Steiner to Rio Rico Properties (December 24, 1984). On certain irrigated parcels within  
28

1 Baca Float’s overall farming operation, these IGFR rights overlay the historic surface water  
2 rights. Thus, on certain parcels, the Department refers to these rights as “dual-filed”  
3 because the surface water rights have not been finally adjudicated, and the Gila River  
4 General Stream Adjudication Court has not made a final determination of the subflow zone  
5 for the Santa Cruz River. *See* S&T Order at 3. Therefore, Baca Float requests that ADWR  
6 expressly recognize in the SCAMA Fourth Management Plan that it will not affect or limit  
7 senior surface water rights as required by A.R.S. § 45-411.04.

8 **II. ADWR Cannot Impose Well Spacing Criteria or Requirements in the SCAMA**  
9 **that Affect or Limit Senior Surface Water Rights Pursuant to A.R.S. § 45-**  
10 **411.04.**

11 ADWR’s Well Spacing Requirements for SCAMA, set forth in Section 10.9 of the  
12 Santa Cruz Fourth Management Plan, require that any person drilling a new well, a non-  
13 exempt well, or a replacement well in a new location must submit a hydrologic study  
14 demonstrating that withdrawals from the proposed well will not result in local water tables  
15 experiencing a long-term decline. SCAMA Fourth Management Plan at 10-10. The  
16 hydrologic study must evaluate projected declines in water levels, and ADWR may refuse  
17 to issue a permit based on the study. *See* Section 10.8, Well Spacing Criteria, SCAMA  
18 Fourth Management Plan at 10-8 to 10-9. In fact, ADWR states that “[i]f ... the  
19 Department determines that a proposed well will have a negative effect on the  
20 maintenance of local water table levels and safe-yield conditions, the Department may  
21 refuse to issue the permit.” SCAMA Fourth Management Plan at 10-9.

22 ADWR is required to include in the SCAMA Fourth Management Plan “criteria for  
23 the location of new wells and replacement wells in new locations consistent with the  
24 management goal of the active management area.” A.R.S. § 45-567(A)(9). However,  
25 ADWR **cannot** adopt Well Spacing Criteria or Requirements that modify or amend laws  
26 relating to surface water nor affect or limit senior surface water rights pursuant to A.R.S.  
27 § 45-411.04. Therefore, ADWR must clarify that the Well Spacing Requirements in the  
28

1 SCAMA Fourth Management Plan will **not** be applied to deny a change in point of diversion  
2 for a senior surface water right in order to protect water levels in wells of junior  
3 appropriators or riparian transpiration demands, even if the senior appropriator is pumping  
4 subflow from a well. As a result, Baca Float requests that ADWR clarify in the SCAMA  
5 Fourth Management Plan that the Well Spacing Requirements set forth in Section 10-901  
6 are **not** applicable to appropriable surface water rights, including wells withdrawing  
7 subflow of the Santa Cruz River.<sup>1</sup>

8 **III. Riparian Transpiration Cannot Be Given Preference Over Senior Surface**  
9 **Water Rights under the Coordinated Management Approach Required by**  
10 **A.R.S. § 45-411.04.**

11 Riparian transpiration demands are increasing and exceed all other demands  
12 combined in the SCAMA. Ratcheting down conservation requirements on senior surface  
13 water users who rely on wells pumping subflow in order to protect riparian demands  
14 effectively gives a preference to riparian demands over senior surface water rights and is  
15 inconsistent with the coordinated management approach required by A.R.S. § 45-411.04.  
16 Indeed, riparian transpiration in SCAMA comprised 19,712 acre-feet per year in 2017,  
17 which was an increase of 3,462 acre-feet since 2010 (more than the City of Nogales,  
18 Arizona pumped in 2017). *See* Table 2-1, SCAMA Fourth Management Plan at p 2-16, and  
19 Figure 3A-2, SCAMA Fourth Management Plan at 3-14. In contrast, all other water  
20 demands in the SCAMA added together account for 17,203 acre-feet per year in 2017, or  
21 2,509 acre-feet less than riparian transpiration demands. *See* Tables 3-1(A) and 3-1(B),  
22 SCAMA Fourth Management Plan at 3-3 and 3-4. Thus, Baca Float requests that ADWR  
23 acknowledge that coordinated management of wells in the SCAMA does not give ADWR  
24 the authority to deny the rights of senior surface water users to change points of diversion  
25 in order to protect increasing downstream riparian demands.

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26  
27 <sup>1</sup> Baca Float reserves the right to challenge the Well Spacing Requirements set forth  
28 in Section 10-901 if ADWR applies them to its senior surface water rights.

1 **IV. SCAMA Is Currently Maintaining Safe-Yield, so No Additional Conservation**  
2 **Requirements Are Necessary in the Fourth Management Period.**

3 Safe-yield means “a long-term balance between the annual amount of groundwater  
4 withdrawn in an active management area and the annual amount of natural and artificial  
5 recharge in the active management area.” A.R.S. § 45-561. ADWR recognizes that “Since  
6 1985, the use of water withdrawn from wells has fluctuated but has not shown a clear  
7 increasing or decreasing pattern.” SCAMA Fourth Management Plan at 11-1. According  
8 to Tables 3-1(A) and 3-1(B), municipal, exempt wells, industrial, and agricultural demands  
9 in the SCAMA in 2017 are in the same range as they were in 1985. *See* Water Demands  
10 and Supply, SCAMA Fourth Management Plan at pp. 3-3 and 3-4. Table 3-4 demonstrates  
11 that total demand from all sectors was almost the same amount in 2015 as in 1985, and  
12 water withdrawn from wells was less in 2015 than in 1985. *See* Water Demands and Supply,  
13 SCAMA Fourth Management Plan at pp. 3-13. In addition, artificial recharge remains fairly  
14 constant, including incidental agricultural recharge and effluent recharge. *See* Section 2.5.2  
15 Underground Water Recharge and Discharge, SCAMA Fourth Management Plan at 2-13 to  
16 2-17. Offsets to groundwater pumping, including natural and artificial recharge are  
17 variable, but conservation requirements have little to no impact on natural variability in  
18 water supply. Therefore, SCAMA maintains a long-term balance between withdrawals and  
19 recharge and is in safe yield. So, no additional conservation requirements are necessary.  
20 Therefore, Baca Float requests that ADWR exercise its discretion and decline to include  
21 additional conservation requirements in the SCAMA Fourth Management Plan. *See*  
22 ADWR Overview of Changes from the Third Management Plan (June 1, 2020).

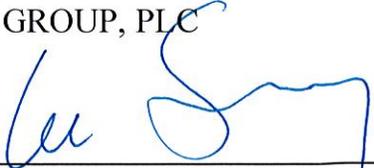
23 **V. Conclusion.**

24 In sum, Baca Float requests that ADWR grant this Motion for Rehearing or Review,  
25 review the Order of Adoption, and revise the SCAMA Fourth Management Plan in the  
26 following ways: 1) to expressly state that it does not affect or limit senior surface water  
27 rights; 2) to clarify that Well Spacing Criteria or Requirements will not affect or limit senior  
28 surface water rights and will not be applied to deny a senior surface water user’s change in

1 point of diversion in order to protect downstream junior users or existing water levels; 3) to  
2 clarify that coordinated management does not give riparian demands preference over senior  
3 surface water rights; and 4) to decline to include additional conservation requirements for  
4 the fourth management period because the SCAMA continues to maintain safe-yield as  
5 required by statute.

6 DATED this 23rd day of November 2020.

7 TSL LAW GROUP, PLC

8  
9 By: 

10 Lee A. Storey  
11 Alexandra M. Arboleda  
12 8096 N. 85<sup>th</sup> Way, Suite 105  
13 Scottsdale, Arizona 85258  
14 *Attorneys for Baca Float #3 LLC*

13 **CERTIFICATE OF SERVICE**

14 ORIGINAL of the foregoing mailed this 23rd day of November 2020 for filing with:

15 Docket Supervisor  
16 Arizona Department of Water Resources  
17 1110 W. Washington Street, Suite 310  
18 Phoenix, Arizona 85007

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5 **I. ADWR Does Not Expressly Recognize that the SCAMA Fourth Management**  
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24 to issue a permit based on the study. *See* Section 10.8, Well Spacing Criteria, SCAMA  
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27 water table levels and safe-yield conditions, the Department may refuse to issue the permit.”  
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17 Riparian transpiration demands are increasing and exceed all other demands  
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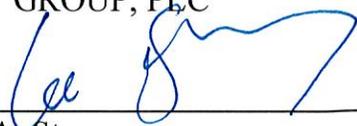
28

1 **V. Conclusion.**

2 In sum, Sopori requests that ADWR grant this Motion for Rehearing or Review,  
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8 clarify that coordinated management does not give riparian demands preference over senior  
9 surface water rights; and 4) to decline to include additional conservation requirements for  
10 the fourth management period because the SCAMA continues to maintain safe-yield as  
11 required by statute.

12 DATED this 23rd day of November 2020.

13 TSL LAW GROUP, PLC

14 By: 

15 Lee A. Storey

16 Alexandra M. Arboleda

17 8096 N. 85<sup>th</sup> Way, Suite 105

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